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Nos. 80-1434, 80-1439, and 80-1632

In the
SUPREME COURT OF THE UNITED STATES
October Term 1980

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner in No. 80-1434,
RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner in No. 80-1439,
PEOPLE OF THE STATE OF ILLINOIS, et al.,
Cross-Petitioners in No. 80-1632

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
BURLINGTON NORTHERN INC.,
Respondents.

BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 24, 1981

QUESTIONS PRESENTED[1]

1. Whether the Court of Appeals erred in affirming the Interstate Commerce Commission's determination that the merger of the Burlington Northern and St. Louis-San Francisco Railway Company, conditioned to require two years of DT&I protection for competing carriers, will have a beneficial effect on the adequacy of transportation to the public, is in the public interest and should be approved?

2. Whether the Court of Appeals erred in affirming the Interstate Commerce Commission's denial of special protective conditions for MKT?

3. Whether the Court of Appeals erred in affirming the Interstate Commerce Commission's determination that the interests of

[1]Pursuant to Rule 28.1 of the Rules of Practice of this Court, Respondent Burlington Northern Inc. states that the following is a listing of all of its subsidiaries (except wholly-owned subsidiaries) and affiliates, with percentage owned indicated: The Belt Railway Company of Chicago (7.69%); Burlington Northern Air Freight (Australian) (99.99%); Butte Pipe Line Company (10.00%); Camas Prairie Railroad Company (50.09%); Chicago Union Station Company (25.00%); The Colorado and Southern Railway Company (90.57%); Davenport, Rock Island and North Western Railway Company (50.00%); Delta Alaska Terminal Ltd. (66.67%); Denver Union Terminal Railway Company (16.67%); Fort Worth and Denver Railway Company (99.97%); Galveston Terminal Railway Company (50.00%); Great Midwest Corporation (49.35%); Houston Belt and Terminal Railway Company (12.50%); Illinois Terminal Railroad Company (18.18%); Iowa Transfer Railway Company (25.00%); Kansas City Terminal Railway Company (16.68%); Keokuk Union Depot Company (33.33%); The Lake Superior Terminal and Transfer Railway Company (66.67%); Longview Switching Company (33.33%); Minnesota Transfer Railway Company (33.33%); National Railroad Passenger Corporation (36.00%); New Mexico and Arizona Land Company (50.07%); Paducah and Illinois Railroad Company (33.33%); Portal Pipe Line Company (60.00%); Portland Terminal Railroad Company (40.00%); Pueblo Union Depot (25.00%); The Pullman Company (4.13%); The St. Paul Union Depot Company (40.20%); Terminal Railroad Association of St. Louis (12.50%); Trailer Train Company (9.76%); Western Fruit Express Company (97.14%); Winona Bridge Railway Company (66.67%); and Wichita Union Terminal Railway Company (33.33%).

affected employees would be appropriately protected by negotiated agreements for certain employees and *New York Dock* conditions for affected employees not covered by such negotiated agreements?

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BRIEF OF RESPONDENT BURLINGTON NORTHERN INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

By decision served on April 17, 1980, the Commission approved and authorized, pursuant to 49 U.S.C. §11344, the merger of Respondent Burlington Northern Inc. (BN) and the St. Louis-San Francisco Railway Company (Frisco). This decision was based on extensive evidence submitted at public hearings commencing May 16, 1978 and concluding June 28, 1979, in which fifteen rail carriers, numerous shippers, and various public agencies (including the United States Department of Justice) participated. In addition to approving the merger transaction, the Commission imposed standard traffic conditions (DT&I condi-

tions) for a period of two years after merger consummation for carriers participating in the proceeding in order to afford them sufficient time to adjust to the impact of the merger.

The Commission's decision was based upon a thorough and searching review of the record evidence and a specific determination that the merger will result in substantial benefits to the shipping public in the form of greatly improved transportation services:

> "Approval of this merger, as conditioned, will have a beneficial effect on the adequacy of transportation to the public. Not only will the services of the merged company be significantly improved, but other railroads will be able to continue providing essential services. The merged company will be able to provide new single-line service, reduced transit times, more efficient and frequent service, and improved car utilization." 360 I.C.C. at 935, A238.[2]

Moreover, the Commission made extensive findings on the shipper support which the merger had attracted; benefits to the railroad industry generally which the transaction would generate; operating efficiencies and savings which the merged company could realize; enhanced opportunities for innovative ratemaking by the new company; and the positive impact which the merger would have both on inter- and intra-modal competition. (*See* 360 I.C.C. at 935-944, A238-247). As the Commission recognized, no party questioned these extensive public benefits. Rather, "Protestants in fact have based their cases on the belief that a merged BN-Frisco system would realize the benefits claimed." (*Id.* at 943, A246).

Fifteen rail carriers intervened in the Commission proceedings seeking various types of protection from the effects of the merger. Following careful consideration of the extensive evidence presented with respect to the necessity for such protection, the Commission concluded that imposition of the standard or DT&I traffic protective conditions for a period of two years would afford affected carriers "sufficient time to adjust to the new competitive climate" (360 I.C.C. at 947, A260). Accordingly, it rejected the

[2]The appendix to MKT's petition (No. 80-1434) is cited herein as A ___, and the appendix to RLEA's petition (No. 80-1439) is cited herein as ___a.

requests of the six carriers, including Petitioner Missouri-Kansas-Texas Railroad Company (MKT or Katy), which continued to press for much more extensive protection (*Id.* at 953-957, A256-260).

Following the issuance of the Commission's decision approving the merger, Katy and the Railway Labor Executives' Association (RLEA) petitioned for review in the United States Court of Appeals for the Fifth Circuit (Nos. 80-1523 and 80-1563) and that Court stayed the Commission's order. The Court of Appeals set the case for expedited handling, and after receiving briefs and oral argument both on the merits of the petitions for review and BN-Frisco's motion to vacate the stay, it issued an order on Friday, November 21, 1980, granting the motion to vacate. BN and Frisco merged on the afternoon of November 21,[3] and that evening Katy obtained a temporary stay of the Fifth Circuit's action. On Monday, November 24, the Court of Appeals released its decision on the merits. On Wednesday, November 26, this Court (by an 8-0 vote, Justice Marshall not participating) vacated the temporary stay and denied MKT's application for a further stay pending filing of a petition for certiorari.

Of the original fifteen carriers participating in the proceedings before the Commission, only two—MKT and Soo Line Railroad Company (Soo)—sought judicial review of the Commission's decision, and only Katy has petitioned for certiorari. Thus, all but one of the carriers which originally intervened have implicitly concurred in the Commission's determination that merger consummation will not impair their continued ability to compete effectively with the merged company and to provide efficient transportation service. RLEA and certain Illinois interests[4] also sought review of the Commission's decision by the Court of Appeals, and these parties now seek additional review by this Court.

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[3]The merger has thus been consummated for more than five months, and the physical consolidation of BN and Frisco operations is complete. Moreover, the Frisco no longer exists as a corporate entity; it has no shareholders, officers or directors; and its assets and obligations have been taken over by BN.

[4]Cross-petitioners in 80-1632, referred to herein as the Illinois interests, are People of the State of Illinois, Illinois Commerce Commission, Patrick W. Simmons, and M. S. Stuckey.

STANDARDS FOR JUDICIAL REVIEW

The decision of the Court of Appeals correctly delineated the appropriate standards for review of the Commission's decision. (632 F.2d at 399-400, A26-28). Petitioners have not challenged the Court's articulation of those standards, choosing instead to dispute the manner in which the Court applied them to the Commission's decision. As is evident from a review of the Fifth Circuit's opinion, the Court correctly concluded that the Commission had observed the statutory limits that Congress has set for its discretion, that it had not acted arbitrarily or capriciously, and that its findings were supported by adequate analysis and substantial evidence. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88 (1944).

Moreover, contrary to the contrived arguments of Petitioners, the Court of Appeals' decision does not conflict with the decisions of any other Courts of Appeals, and the standards for this Court's granting review on certiorari have not been met. *See* Rule 17, *Supreme Court Rules—The 1980 Revisions,* BNA (1980) at 49.

ARGUMENT

I. THE COURT OF APPEALS EMPLOYED THE PROPER STATUTORY ANALYSIS IN AFFIRMING THE COMMISSION'S DECISION TO APPROVE THE MERGER.

Katy first argues that the Commission failed to discharge its statutory obligation, pursuant to 49 U.S.C. §11344(b), to consider the effect of the proposed transaction on the adequacy of transportation to the public, including the service provided by other rail carriers, and that the Court of Appeals thus erred in affirming the Commission's approval of the merger. (Katy Pet., pp. 19-23).

This contention simply ignores the Commission's response to the statutory requirements and the lower Court's review of that aspect of the Commission's decision. Both the Commission and the Court of Appeals recognized that merger approval required analysis of the impact on the adequacy of transportation services provided by all rail carriers. Thus, the Court's opinion commences with an explicit recitation of the factors set forth in 49 U.S.C.

§11344(b) which the Commission is "required to consider" in a merger proceeding, specifically noting that one of these factors is "the effect of the proposed transaction on the adequacy of transportation to the public." (632 F.2d at 395, A5-6). The Court found that the Commission had carefully evaluated the evidence concerning the many merger benefits which would accrue to the shipping public and the evidence offered by competing carriers concerning the claimed negative impact of the merger. (632 F.2d at 397-9, A17-20). The Court concluded that, based on its assessment of the relevant evidence and "having closely reviewed the positions of all the parties" in a manner consistent with the "criteria of merger approval contained in the relevant statutes," the Commission properly exercised its discretion to approve the merger (632 F.2d at 398, A20).

As the Court noted, the Commission reached its decision to approve this merger only after a full and careful evaluation of the merger's impact on rail service provided by other carriers as required by § 11344(b), and clearly treated this as a component of the public interest standard:

> "The Commission has determined that the public will benefit in overall service if competing carriers are less shielded from the need to face the challenge of strong merged carriers. Burlington Northern Inc.—Control and Merger, 360 I.C.C. at 950-2. In order to gain that overall benefit for the public, the Commission has decided that only 'essential services' should be protected. We find the new weighing of the public interest perfectly appropriate under § 11344(b)(1) and any of the other broad statutory standards." (632 F.2d at 403, A40).

Katy attempts to support its contrived argument that the Court of Appeals "made a basic error in its understanding of . . . the statutory prerequisites for merger approval" by reference to one sentence in the opinion which states "[n]one of the petitioners directly challenge the Commission's ultimate conclusion that the BN-Frisco merger is in the public interest." (Katy Pet., pp. 19-20). Katy conveniently overlooks the next sentence where the Court states that "the validity of that conclusion" [that the merger is in the public interest] is attacked indirectly by challenges to specific

findings by the Commission (632 F.2d at 399, A24), including the Commission's finding that "Katy can withstand these diversions without a loss of essential service." (632 F.2d at 408, A61).

It is clear, therefore, that Katy's contention that an improper statutory analysis was applied by the Commission and the Court of Appeals presents absolutely no issue for review by this Court.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COMMISSION'S RELIANCE ON AN "ESSENTIAL SERVICES" STANDARD IS ENTIRELY CONSISTENT WITH THE STATUTORY CRITERIA GOVERNING APPROVAL OF RAIL MERGERS.

Katy also challenges the decision below on the ground that the "essential services" standard employed by the Commission in reviewing the merger is inconsistent with the applicable statutory criteria governing approval of rail mergers. This argument was thoroughly considered and definitively rejected by the Court of Appeals, and does not warrant review by this Court.

Under the "essential services" standard, the Commission assesses the impact of a merger on rail carriers by determining whether it might impair their continued ability to render transportation services essential to the public. As the Court of Appeals recognized, this standard was adopted by the Commission early in 1978 after an extensive review of consolidations, including public hearings conducted by its Rail Services Planning Office (RSPO), after enactment of the Railroad Revitalization and Regulatory Reform Act ("4-R Act") in 1976. *See* 632 F.2d at 400-401, A31-32. Katy's claim here, as before the Court below, that this approach was new and "shocking" in the BN-Frisco decision is simply unsupported by the facts. (Katy Pet., p. 32).

As the Court of Appeals correctly found, the essential services standard, initially formulated by RSPO, represents "a new weighing of subsidiary factors within the public interest standard" (632 F.2d at 402, A36) which is fully proper under the statutory framework governing approval of rail consolidations. (632 F.2d at 402, A39-40).

Moreover, the Commission's determination to utilize an "essential services" analysis in assessing proposed rail consolidations

was based on its exercise of the expertise it uniquely possesses in such matters. This determination is precisely the type of "sensitive re-evaluation of the public interest" (632 F.2d at 403, A40) which is an integral part of the Commission's regulatory function. As this Court has recognized:

> "[T]he Commission, faced with new developments or in light of reconsideration of relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . This kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of the regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

Because Congress has bestowed a broad mandate upon the Commission in matters affecting transportation, this Court has consistently shown great deference to policy determinations of this nature made by the Commission in merger proceedings. As stated by this Court in the *Penn-Central Merger Cases*, 389 U.S. 486, 499 (1968):

> "[W]ith respect to the merits of the merger, our task is limited. We do not inquire whether the merger satisfies our own conception of the public interest. Determination of factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute."

See also, Ralston Purina Co. v. *Louisville & N. R. Co.*, 426 U.S. 476, 477-478 (1976); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-6 (1975). Katy's challenge to the Commission's policy determination should, therefore, be rejected.

Application of this essential services standard is not, as Katy argues, inconsistent with the Commission's mandate under 49 U.S.C. §11344 to consider the effect of a merger on the

"adequacy of transportation service." In assessing the impact of this merger, the Commission explicitly found, based on the extensive evidence submitted by all interested parties, including carriers such as Katy which claimed the merger might adversely affect them, that "[a]pproval of this merger, as conditioned, will have a *beneficial* effect on the adequacy of transportation to the public." (360 I.C.C. at 931, 935-941; A234; 238-244; emphasis added).[5]

Katy next contends that the "essential services" standard conflicts with the National Transportation policy "to encourage sound economic conditions in transportation, including sound economic conditions among carriers." 49 U.S.C. § 10101. Katy argues that by its reliance upon an "essential services" standard, "the Commission now welcomes the bankruptcy" of carriers, such as Katy, which may lose traffic as a result of a rail merger. (Katy Pet., p. 32). Nothing in the Commission's decision supports Katy's exaggerated suggestion. The decision simply articulates the Commission's judgment that the public interest will best be served by focusing on preservation of service, rather than preservation of corporate entities which do not provide needed transportation services. The Commission's decision makes it clear that where a merger threatens to jeopardize the ability of any carrier, weak or strong, to provide essential services, appropriate protective conditions will be afforded. As the Court found, this standard for approval of merger is fully consistent with the broad objectives of the National Transportation Policy set forth in 49 U.S.C. § 10101. (632 F.2d at 403, A40).

Katy's argument that the Commission's decision ignores the need for "sound economic conditions" among railroads adversely affected by the merger overlooks the Commission's overall finding that the merger will not impair any railroad's ability to continue to provide essential rail services (360 I.C.C. at 935, A238) and its specific finding that Katy's future prospects are "bright" and

[5]Katy's related contention that the Commission adhered to a "double standard" in approving the merger is equally untenable. By applying the "essential services" standard consistently throughout its opinion, as the Court found (632 F.2d at 401, A33-34), and thereby focusing on the quality of service rather than on which corporate entity provides it, the Commission clearly adhered to a standard designed to emphasize the adequacy of transportation to the public.

sufficient to protect it against losses in traffic revenues which may result from the merger. (360 I.C.C. at 954-955, A257-258). These findings also destroy Katy's contention that the "adequacy" of Katy's service after merger was ignored. (Katy Pet., p. 33). As stated, the Commission found that consummation of the merger would have a beneficial overall effect on the adequacy of transportation services provided to the shipping public. This finding, based on the Commission's exhaustive analysis of the evidence, completely satisfies the Commission's obligation to consider the impact of a rail merger on the adequacy of transportation to the public.[6]

III. THE COURT OF APPEALS PROPERLY SUSTAINED THE COMMISSION'S DETERMINATION THAT MKT IS FULLY CAPABLE OF WITHSTANDING THE IMPACT OF THE MERGER.

Based on its review of the evidence, the Commission determined that Katy is fully capable of withstanding a projected loss of $8.75 million in gross revenues and $4.5 million in net revenues (360 I.C.C. at 954, A257). The Court of Appeals affirmed this finding, stating that "a review of the record shows that the Commission cited very reliable evidence as the basis of its projection that Katy can withstand these diversions without a loss of essen-

[6]The Illinois interests also challenge the essential services standard, contending that the Commission erroneously lifted "the more lenient 'essential services' standard from section 5(3) [49 U.S.C. §11346] and made it applicable to section 5(2) [49 U.S.C. §11344] proceedings." (Pet., p. 8). In the first place, the essential services standard was *not* taken from either §11346 or §11344, but, as noted above, was the product of the Commission's own extensive study of rail consolidations conducted through its RSPO. Moreover, the Commission has determined that the public interest standard for merger approval is the same for applications processed under either §11344 or §11346. Railroad Consolidation Procedures, 359 I.C.C. at 199 (1980). Thus, as the Court found, the Commission's decision to apply an essential services standard as a component of the public interest standard was perfectly proper under either §11344 or §11346 (A35-37).

The Illinois interests' further argument (Pet., pp. 10-11) that the Commission should have made findings on the cumulative impact of this merger on other possible rail consolidations ignores both the settled law that such specific findings concerning projections of future events are not required, *FCC* v. *National Citizens Committee*, 436 U.S. 775, 814 (1978), as well as the practical fact that any such requirement would directly contravene the Congressional intent expressed in the 4-R Act to expedite rail merger proceedings (S. Rep. No. 94-499, 94th Cong., 2d Sess. (1975), pp. 13, 18). *See* 632 F.2d at 410, A72-73.

tial service." (632 F.2d at 408, A61). On petition to this Court Katy recites again the same arguments concerning these findings which have now been raised and rejected before both the Commission and the Court of Appeals.

We emphasize at the outset that where, as here, the Court of Appeals has found the agency's findings to be supported by substantial evidence, further review by this Court is unwarranted:

> "Our power to review the correctness of application of the present ["substantial evidence"] standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeal. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-1 (1951).

In any event, it is clear that the Commission's findings in this respect are abundantly supported by the evidence.

Although Katy criticizes the Commission's findings as to its future prospects, it cites no evidence to support its contention that it will be unable to withstand the merger's impact. The reason for this glaring omission is that Katy failed to present any such evidence to the Commission. The only evidence submitted by Katy concerning the potential post-merger impact consisted of three-year financial projections which were based on the assumption (admitted by Katy to be erroneous) that the merger would be consummated in 1978, an assumption which totally undermined the validity of Katy's entire post-merger analysis. (Exhibit H-160, Nos. Z-7 and Z-8). The financial projections submitted by Katy, which treat 1979, 1980 and 1981 as three post-merger years, thus did not afford the Commission any evidence of the impact of the merger on Katy's post-merger operations.

Despite the fundamental deficiencies in its own presentation regarding post-merger impact, Katy challenges the Commission's findings with respect to three post-merger developments which the Commission found would enable Katy to fully withstand the

impact of the merger. Although Katy criticizes the basis for these findings, it concedes in its petition that they were taken largely from the testimony of its own witnesses and its exhibits. (Katy Pet., p. 36).

Katy first criticizes the Commission's finding that anticipated coal movements will contribute to its post-merger viability. (Katy Pet., pp. 37-39). As the Court of Appeals noted, however, the evidence on this point was abundant and, in fact, would have alone been sufficient to support the Commission's view that Katy can withstand the impact of the merger:

> "... the Commission found that Katy can expect strong growth in revenues because of coal transportation for several new electric generating plants. Three of these units were completed as of the time of the Commission's opinion, and Katy itself projected $26 million annually in new revenues from these plants alone. Five additional units were and are projected, each generating $10 million in additional gross revenues for Katy. These findings alone would support the Commission's view that Katy can withstand the merger, because the maximum gross revenue loss for Katy due to the merger is projected to be about $9 million. 360 I.C.C. at 1091." (632 F.2d at 408, A61-62).

Moreover, the evidence concerning these vast new coal movements in post-merger years beyond 1981 consisted of financial projections and testimony of Katy's own witnesses, including the testimony of Katy's president (Tr. 5929-5931; Exhibit H-149, p. 11; Tr. 6534-36). Katy also assured its stockholders that these coal movements "should provide very substantial new business in future years." (MKT Annual Report 1977, pp. 3-4).[7]

Katy also challenges the validity of the Commission's findings concerning the favorable impact on its net revenue prospects re-

[7]The significance of this future coal traffic is conclusively established by Katy's indemnity proposal. Katy proposed that the indemnification to be paid exclude any new coal traffic delivered by the merged company to MKT for the LCRA and GRDA plants. On Brief to the Commission, Katy stated that "[i]f such traffic were not excluded from the post-merger interchange revenues referred to in MKT's proposed formula, the effect of its inclusion would be to eliminate the need to pay indemnity, even if all traffic estimated by MKT to be diverted were diverted." (MKT Br., pp. 34-35, fn. 21)

sulting from the completion of its massive rehabilitation program. Regarding that claim, the Court of Appeals properly noted that "the testimony of Katy's own witnesses largely supported the Commission's evaluation of the program" and therefore "Katy cannot argue with the Commission's choice to believe them." (632 F.2d at 408, A62). Moreover, Katy's contention that the Commission should have been more precise as to the exact time the rehabilitation program will be completed is absurd in light of the fact that Katy's own evidence offered on this issue was equally general in character. Thus Katy's own executives testified in terms of completing the rehabilitation "within the next three years." (Exhibit H-149, p. 3; Tr. 5921). Further, Katy's witnesses referred to rehabilitation of the entire railroad (Tr. 5921) and there is no evidence to support MKT's present suggestion (Katy Pet., p. 40) that the program addresses less than all of MKT's current rehabilitation needs, including the St. Louis line.

Katy next contends that the Commission's findings as to the benefits from its tax agreement with its parent are erroneous. Again, the Court's discussion convincingly disposes of this argument:

> ". . . the Commission recognized that Katy had concluded an agreement with its parent company to be reimbursed for any Katy tax losses that could be utilized by the parent company. The agreement is an undisputed fact, and demonstrably provides Katy with a significant 'cushion' against losses. It was not an improper consideration in evaluating Katy's overall financial stability." (632 F.2d at 408, A63).

Moreover, the Commission did not itself calculate the financial benefits of the agreement but, again, implicitly relied on Katy's own evidence of such benefits for the years 1978-81 (Exhibits H-160, H-166). These specific dollar amounts clearly support the Commission's finding that the agreement provides significant financial benefits for Katy. Any technical inaccuracy in the Commission's description of the agreement is thus of no significance.

Katy also objects generally to these findings on the grounds that the Commission has not reduced each of these post-merger prospects to a finite mathematical projection. It is settled, however, that an agency is not required to engage in the futile task of making finite mathematical findings concerning future projec-

tions, particularly where, as here, the agency has employed its expert judgment concerning three uncontested post-merger prospects each of which will have a substantial undisputed favorable impact on Katy's future. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *United States* v. *ICC*, 396 U.S. 491, 516 (1970); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28-29 (1961).

The Commission's findings that Katy can withstand the impact of the merger are thus abundantly supported by evidence of record and present no basis for review by this Court.

IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COMMISSION'S FINDINGS AS TO MKT'S PROJECTED MERGER REVENUE LOSSES WERE AMPLY SUPPORTED BY EVIDENCE OF RECORD.

MKT's contention that the Fifth Circuit erred in affirming the Commission's findings with respect to Katy's projected merger revenue losses (Pet. pp. 46-53) is completely without merit. In response to Katy's identical contention below, the Court carefully analyzed the Commission's detailed examination of the evidence submitted both by BN-Frisco and by MKT itself as to projected revenue losses due to diversions of traffic from Katy to the merged company (*see* 360 I.C.C. at 1069-1073, A372-376 and 1083-1091, A386-394) and concluded that the Commission's findings—that Katy might suffer a *maximum* gross revenue loss of $8.9 million and a *maximum* net revenue loss of $4.5 million[8]—were amply supported by record evidence. (632 F.2d at 404-407, A44-58).

The predicate for Katy's argument that there was no substantial evidence to support the Commission's diversion findings is simply that the Commission determined that it would impose the so-called "DT&I conditions" (which prohibit the merged company from closing gateways and cancelling joint rates and routes with other carriers) for a period of two years. Since the BN-Frisco studies of projected diversions assumed that 100 percent of such

[8]The likelihood that Katy and other carriers would be forced to respond to the competitive challenge of the merged company with initiatives of their own (and thereby minimize the scope of projected diversion losses) was recognized by the Commission to be a positive factor weighing in support of the merger's approval. *See* 360 I.C.C. at 943-944, A246-247.

diversions would not be realized for three years following consummation of the merger and that DT&I conditions would be in effect for those years, MKT protests that there is no way to know whether greater diversions of its traffic might occur after the DT&I conditions have been lifted. As the Court correctly noted, however, the Commission's finding that 95 percent of all diversions which would occur because of the benefits "inherent in the merger itself"[9] would take place by the second year after merger (632 F.2d at 405, A49) made its diversion estimates 95 percent complete and reliable for the first two full years following merger.[10] *(Id.* at 407, A57).

Accordingly, MKT does not and cannot dispute the fact that the Commission made a soundly reasoned projection (indeed, an intricately reasoned projection, *see* 360 I.C.C. at 1083-1091, A386-394) of the maximum losses which Katy might experience during the first two years of the merged company's operations. Since it is well-settled that the Commission is not required to make traffic diversion projections with mathematical precision[11] and in view of the fact that the Commission itself acknowledged in detail the limitations of such projections which ". . . have as their purpose the quantitative measurement of the expected *general, short-term changes* in the relative competitive strength of a merged rail system in relation to competing carriers" (360 I.C.C. at 1068-69, A371-372, emphasis added), the Commission's obligation to consider the revenue impact of the merger on other railroads was properly discharged. Indeed, as the Fifth Circuit recognized, the Commission was free to exercise its expert judgment with respect to the relevant period of time for evaluating the merger's impact on the public interest, and it was free to conclude that a two year analysis was adequate. (632 F.2d at 405, fn. 34; A52, fn. 34).

[9]These merger benefits—notably single-line service and the faster transit times and greater reliability associated therewith—were recognized by Katy itself as the most significant factors contributing to diversion of its traffic. 360 I.C.C. at 1084, A387.

[10]In the case of MKT, the estimate was 100 percent reliable since Katy's own evidence showed that it projected 100 percent of all diversions would occur by the end of the second year. See 360 I.C.C. at 1084, A387.

[11]*See, e.g., Chicago & N.W. Ry. Co.—Merger—Chicago G.W. Ry. Co.*, 333 I.C.C. 236, 238-239 and cases cited therein; *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 754, 759 (1968).

However, since a number of the Commission's other merger projections were made for a three year period, the Court felt compelled to consider MKT's argument that substantial evidence was both required for and absent from the analysis of adverse impact on other carriers. Respondent Burlington Northern does not believe that the Commission was required to make further findings as to impacts either in year three or in following years. However, to the extent that the possibility of any additional diversions following the lifting of the DT&I conditions is a proper subject of concern, the Fifth Circuit correctly concluded that *whether* additional diversions occur at all is totally within the control of the Commission and MKT. (632 F.2d at 406, A53). Specifically, the Commission's reserved jurisdiction under condition 1(j) of the decision (360 I.C.C. at 1180, A483) affords all parties to the proceedings, including Katy, an opportunity to seek an extension of the time in which DT&I conditions will apply to the transaction, should actual experience prove such relief necessary. This avenue of potential redress has been held by the courts to constitute an adequate safeguard against the possibility that the diversion losses actually experienced are greater than originally estimated.[12] *See Penn-Central Merger Cases,* 389 U.S. 486, 520 (1968); *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd per curiam,* 375 U.S. 216 (1963).

Moreover, as the Court noted, existing provisions of the Interstate Commerce Act, which the Commission has given notice it intends to vigorously enforce,[13] would prohibit the merged company from arbitrarily cancelling joint routes and rates with, or closing gateways to Katy once the DT&I conditions are lifted. Indeed, Section 11101 (requiring BN to honor fundamental com-

[12]The Commission has repeatedly emphasized the importance of this post-merger remedy:

> "Our reserved powers are adequate to deter improper traffic diversion, inequitable conduct on the part of the merged company, or if necessary, to provide additional protection in the future." *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 331 I.C.C. 754, 759-760 (1968) (emphasis added). *See also, Chicago & N.W. Ry. Co.—Merger—Chicago G.W. Ry. Co.,* 333 I.C.C. 236, 239 (1968).

[13]*Seaboard Coast Line R.R. Co.—Investigation of Control,* 360 I.C.C. 582, 603 (1979); *St. Louis Southwestern Ry. Co.—Purchase (Portion)—Chicago, Rock Island and Pacific R.R. Co.,*____I.C.C.____(1979); *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.,* 363 I.C.C. 518 (1980), *appeal pending* 7th Cir. No. 80-2534.

mon carrier obligations by providing service and establishing reasonable through routes and rates); Sections 10741 and 10742 (requiring BN to provide reasonable and equal interchange facilities with connecting carriers); and Section 10705(d) (preventing BN from cancelling existing joint rates and through routes unless it can establish that such cancellation is consistent with the public interest) afford MKT ample protection against additional significant diversions once the DT&I conditions have been lifted.[14]

In addition, the Court's proper acknowledgment that the Commission is entitled to use its expertise to independently analyze and, where appropriate, to supplement the parties' projections of future economic conditions (632 F.2d at 406, A55-56) should set to rest the contention that the Commission's assessment of Katy's ability to withstand the competitive rigors of the merger was not supported by substantial evidence. As discussed previously, the Commission considered in detail both Katy's problems and future opportunities and concluded that the carrier's "future prospects are sufficient to protect it." (360 I.C.C. at 955, A258). Since the Commission made that judgment with the knowledge that it was imposing DT&I conditions on the transaction for a period of only two years, it necessarily factored the possibility of additional diversion losses following the lifting of the conditions into its evaluation. As the Fifth Circuit correctly observed, this Court has often held that the Commission's "predictive judgments" are entitled to considerable deference, and "[t]o hold otherwise would

[14]Katy's claim that such protections are useless because they would require it to pursue its remedies with the Commission (Pet., p. 52, fn. 15) warrants little credence. Not only has Katy vastly overstated the scope of what it would have to do to pursue such cases (since a relatively few of the "thousands of routes" it refers to account for a large portion of its total traffic with BN and since BN would have the burden of proving the public interest benefits of any cancellations), but it has revealed its true concern that it might not fare well in justifying the maintenance of any joint routes or rates for which cancellation could be sought. MKT's reservations on this score lend support to the Commission's concern that it not impose conditions ". . . calculated to freeze the flow of traffic into a preexisting pattern or to protect competing and connecting carriers against all possible adverse effects which might follow from the unification and resulting improvements in service by the surviving corporation. Such action would prevent, to a substantial extent, the effectuation of service improvements to which the shipping public is entitled, and would unduly restrict the unified company in its solicitation and routing of traffic under development of a strong competitive system." (360 I.C.C. at 951, A254, footnotes omitted).

paralyze agencies merely because the future is not subject to proof." (632 F.2d at 406, A56).

Finally, BN notes that the Fourth Circuit recently dealt with the issue of the DT&I conditions in *Norfolk and Western Railway Company* v. *United States,* decided on February 17, 1981 (4 Cir. No. 79-1862), a case which no Petitioner has cited. There the Fourth Circuit affirmed a Commission decision with respect to control of the very railroad for which the conditions are named—the Detroit, Toledo and Ironton (or DT&I)—but remanded the case on the grounds that the Commission had altered its policies on the conditions in that proceeding without giving proper notice to the parties. There are, however, fundamental dissimilarities between the Commission's decisions in *BN-Frisco* and *Norfolk and Western* which make the actions of the reviewing courts entirely distinguishable.

First, rather than imposing DT&I conditions for the benefit of protesting railroads for a two year period as it did in *BN-Frisco,* the Commission in *Norfolk and Western* refused to impose DT&I conditions *for any period at all.*[15] Moreover, the Commission's decision in *Norfolk and Western* did not contain the reasoned analysis of the anticompetitive and chilling effects of conditions which appears in *BN-Frisco* (see 360 I.C.C. at 950-952, A253-255), and which the Fifth Circuit held to constitute adequate support for ". . . the Commission's larger policy decision restricting the use of protective conditions . . ." (632 F.2d at 409, A69). Thus the Fourth Circuit was faced with a decision which was essentially devoid of the requisite articulation of the reasons supporting a change in Commission policy. The Fifth Circuit on the other hand, found the required articulation in *BN-Frisco* and correctly noted that this Court has approved policy changes in such circumstances. *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267 (1974); *Atchison, T. & S.F. Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973); *American Trucking Assns, Inc.* v. *Atchison, T. & S.F. Ry. Co.,* 387 U.S. 397 (1967).

[15]The significance of the Commission's application of the conditions for a two year period in *BN-Frisco* is that MKT will have a sufficient opportunity during this time to adjust to the merger's impact by implementing competitive initiatives of its own and, if necessary, to petition the Commission for additional relief. The Commission's decision in *Norfolk and Western* afforded adversely impacted carriers no similar protection for a transition period within which the impacts of the merger could be analyzed and appropriate responses developed.

Second, Katy did not pursue the issue of the propriety of the Commission's decision to limit DT&I conditions before the Fifth Circuit, and it has not raised the issue in its Petition for Certiorari. In fact Katy took extreme care to advise the Court below that it was specifically *not* raising that issue for consideration but was rather contending that the limitation resulted in an undermining of substantial evidence needed to support Commission findings as to MKT's future prospects:

> "Katy does not regard this appeal as the proper forum for determining the desirability of retention or elimination of the DT&I conditions *and has not herein asserted the decision to limit them as independent error.*" Reply Brief of Missouri-Kansas-Texas Railroad Company before the Fifth Circuit, dated July 29, 1980, at p. 20 (emphasis added).

Similarly, Katy in its Petition for Certiorari again limited its argument to the substantial evidence point, contending that "Whatever the merits of the Commission's decision to limit the time period of the DT&I conditions as a matter of policy, the evidence herein is inadequate to support the finding that the maximum loss to Katy will be only $8.75 million a year . . ." (Pet. p. 48). Accordingly, the issue decided by the Fourth Circuit was explicitly disavowed by Katy as an issue for review both before the court below and before this Court.[16]

It has long been a well-settled point that, in the words of Justice Black, "Ordinarily an appellate court does not give consideration to issues not raised below."[17] *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941). *See also, American Air Export & Import Co.* v. *O'Neill,* 221 F.2d 829 (D.C. Cir. 1955); *United States* v. *Wurtsbraugh,* 140 F.2d 534 (5th Cir. 1944). Of necessity the rule must apply even more forcefully in cases where a party like Katy has

[16]Moreover, to the extent that there might be any need for further resolution of the policy issue of the treatment of DT&I conditions, the most appropriate forum in which to frame that resolution is the Commission's pending rulemaking proceeding in *Ex Parte No. 282 (Sub-No. 5),* 45 F.R. 46461 (July 10, 1980). MKT is a party to that rulemaking proceeding.

[17]Although courts have recognized an exception to the rule, they have confined the exception to instances where ignoring a new argument would work a grave injustice—notably in criminal cases. *See Anderson* v. *United States,* 417 U.S. 211, 217, fn. 5 (1974). Such an exception can hardly be deemed appropriate where, as here, a party has taken pains to articulate actual disavowal of the point before the court below.

taken affirmative steps to advise the reviewing court that it knowingly disavows a particular claim as grounds for error.

V. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE COMMISSION'S DECISION TO DENY MKT SPECIAL PROTECTIVE CONDITIONS DID NOT VIOLATE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS.

Katy argues that although the Commission has granted indemnification previously, its decision not to do so in this case, accompanied by the dual warning that such relief will no longer be viewed "as a viable condition under any circumstances" (360 I.C.C. at 953, A256) and that the Commission will not impose conditions not sought by a protesting carrier (*Id.* at 951, A254), constitutes a denial of procedural due process. (Pet., pp. 54-65)

As the Fifth Circuit found, Katy's argument is academic because of the overriding consideration that these policies had no actual impact on Katy in this case:

> "There is no indication in the opinion itself that the Commission reached any decision through applying the new policies to Katy. The Commission consistently states that Katy failed to establish the need for any protective condition at all, *a decision on the merits that does not involve either policy.*" (632 F.2d at 410, A70-71, emphasis added).

MKT's suggestion that this fundamental finding "was made only in the context of the Commission's denial of [indemnification] relief" (Pet., p. 59) is absolutely erroneous. After reviewing the evidence of Katy's future prospects (which it termed "bright", 360 I.C.C. at 954, A257), the Commission found that *those prospects* "are sufficient to protect it."[18] Obviously, once the Commission had concluded that Katy's future business and potential were sufficient to protect it, there was no reason to consider protective conditions for its benefit.[19]

Katy's suggestion that because the Commission imposed certain trackage rights conditions on behalf of the Chicago and

[18] Following an extensive review of Katy's business history and prospects (360 I.C.C. at 1118-1122, A421-425), the Commission concluded that "Even with consummation of the merger MKT should produce a profit in 1981." (*Id.* at 1122, A425).

[19] It should be noted, however, that despite its announced "unrequested conditions" policy, the Commission was aware of, and explicitly acknowledged that "[its] statutory authority to impose such conditions is not limited to conditions proposed or favored by the carriers." (360 I.C.C. at 933). *See also, Illinois Central Gulf R. Co.—Acquisition—G.M.&O. et al.*, 338 I.C.C. 805, 844 (1971).

Northwestern Railroad Company (CNW) it "might well have granted such relief" to MKT (Pet., p. 59) is both speculative and misleading. As Katy knows full well, CNW and eight other carriers entered into stipulation agreements with the merger applicants for certain conditions in return for those parties' not opposing the transaction. *See* 360 I.C.C. at 1152-1156, A455-459. In recognition of the fact that these stipulated conditions were "operationally feasible, [would] not detract from the benefits of the merger, and are in the public interest" (360 I.C.C. at 957, A260) (and that they represented voluntary settlements by the parties), the Commission imposed them on the transaction. Contrary to the suggestion by MKT (Pet., p. 60, fn. 19), *all* stipulated conditions save one—which was opposed by another carrier and found by the Commission to be inimicable to the public interest (360 I.C.C. at 957, A260)—were imposed. Katy never proposed any similar conditions and indeed advised the Commission during the presentation of its case that it was not interested in trackage rights and that indemnity was the only acceptable condition. (Exhibit H-160, pp. 27-28).

Equally unconvincing is Katy's attempt to dispute the Fifth Circuit's unequivocal conclusion that Petitioner's claimed reliance on being accorded an indemnification condition was "grossly misplaced" (632 F.2d at 410, A71). As the Court accurately observed, the Commission has imposed indemnification as a condition only twice in its history and then, as the Commission itself noted (360 I.C.C. at 952, A255), only as a short-term or interim measure "while a more permanent solution" was being fashioned. *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304 at 326-327 (1966); *Chicago & Northwestern Ry. Co.—Control—Chicago, Rock Island and Pacific R.R. Co.*, 347 I.C.C. 556 (1974). Moreover, even in those two cases (neither of which resulted in the Commission's actually administering an indemnity condition), the basis for imposing the relief was the Commission's finding that the merger under review threatened the continued existence of carriers whose preservation was deemed essential to the public interest.[20] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 at 529, 532 (1966); *Chicago & Northwestern Ry. Co., supra* at 616,

[20]Katy's statement that "no case at all denying indemnity is cited by the Court of Appeals" (Pet., p. 61) is disingenuous. As MKT is aware, the Commission has

(Footnote continued on next page.)

627, 630-31. As discussed previously, the Commission here made specific findings both that Katy's continued existence was not threatened and that essential services provided by Petitioner would not be lost.

Finally, Katy simply cannot escape the fact that the policy changes of which it complains were found by the Court of Appeals to have been adequately explained by the Commission in the *BN-Frisco* decision. (632 F.2d at 408-409, A66-70). Moreover, as the Court indicated, "An agency may change its policies in the course of a specific adjudication, *American Trucking,* 387 U.S. at 416, 87 S.Ct. at 1618, and even apply those policies for the first time to the parties involved, *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 292-294 (1974); *SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947)."[21] (632 F.2d at 409, A66). *Accord, Pre-Fab Transit Co.* v. *United States,* 595 F.2d 384 (7th Cir. 1979); *Sawyer Transport, Inc.* v. *United States,* 565 F.2d 474 (7th Cir. 1977); *Pittsburgh and Lake Erie R. Co.* v. *United States,* 294 F.Supp. 86, 95 (W.D. Penn. 1968). As the Fifth Circuit's decision and these additional citations make clear, there is simply no merit to Katy's claim of a conflict of Circuits on this point.

VI. THE PETITION FOR WRIT OF CERTIORARI FILED BY RAILWAY LABOR EXECUTIVES' ASSOCIATION DOES NOT RAISE ANY ISSUE WARRANTING REVIEW BY THIS COURT.

A. The Court of Appeals Properly Affirmed The Commission's Order Concerning The Scope of Employee Protection Afforded by 49 U.S.C. §11347; Moreover, The *Soo Line* Decision Presents No Conflict With the Decision of the Court Below.

Railway Labor Executives' Association ("RLEA") first contends that the Commission's determination, fully accepted by the

(Footnote continued from previous page.)
rejected indemnity conditions in a number of cases, and Respondents cited such cases to the Court. *See, e.g., MoPac—Merger—T&P and C&EI,* 348 I.C.C. 414, 424 (1976); *Pennsylvania R. Co.—Merger—New York Central R. Co.,* 331 I.C.C. 643, 736-737 (1967).

[21]The Supreme Court's ruling in *American Trucking Associations* v. *Atchison T. & S.F. Ry. Co.,* 387 U.S. 397, 416 (1967), is particularly on point in view of the Commission's reasoned analysis of the changes in the railroad industry and the regulatory climate which led it to change its policy with respect to indemnification (see 360 ICC at 952-53, A255-256).

Court of Appeals, that employees of non-applicant competing carriers are not within the class of employees protected by 49 U.S.C. §11347 of the Interstate Commerce Act, is erroneous and, in light of the allegedly conflicting decision in *Soo Line R. Co.* v. *United States,* 280 F. Supp. 907 (D. Minn. 1968), warrants review by this Court. This argument is totally without merit.

As the Court of Appeals properly reasoned, a plain reading of the statutory provision involved (49 U.S.C. §11347) refutes RLEA's assertion that protection must be extended to employees of competing carriers:

> "The Commission first noted that, although the first sentence of §11347 seems to require protection for any carrier employee affected by the merger, the second sentence provides, in an undifferentiated transition, that 'the arrangement may be made by the rail carrier and the authorized representative of its employees.' It is difficult to imagine that when Congress wrote this sentence it was contemplating that a non-merging carrier would agree to protect its own employees from the merger of two competing carriers. Because the second sentence obviously applies only to the merging carrier, the Commission reasons that Congress intended the same meaning in the preceding sentence." (37a-38a).

Similarly, a three-judge court in *Florida East Coast Railway Company* v. *United States,* 259 F. Supp. 993, 1019 (M.D. Fla. 1966) *affirmed per curiam,* 386 U.S. 545 (1967), agreed that this construction is "the logical interpretation of the statute."

This statutory interpretation is reinforced by the legislative history of the provision. Section 11347 was first enacted as Section 5(2)(f) of the Transportation Act of 1940. The basis of Section 5(2)(f) was the Washington Job Protection Agreement of 1936 ("WJPA"). *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169, 173-4 (1961); *United States* v. *Lowden,* 308 U.S. 225, 237-38 (1939).[22] The term "employees affect-

[22]See also *New York Dock Ry.* v. *United States,* 609 F.2d 83, 86 (2d Cir. 1979); testimony of George M. Harrison before the House Committee on Interstate and Foreign Commerce, H.R. 2531, 76th Congress, 1st Sess. (1939), pp. 213, 216-17, 241 and 243; and before the Senate Committee on Interstate Commerce, S. 1310, 2016, 1869, and 2009, 76th Cong., 1st Sess. (1939), p. 34.

ed" was taken directly from the WJPA which limited its job protection to employees of the merging carriers.[23]

Further, the Commission and the courts have consistently and overwhelmingly held that this provision does not apply to employees of competing carriers, despite repeated unsuccessful efforts by labor interests to secure a contrary statutory interpretation.[24] Moreover, Congress explicitly sanctioned this settled Commission interpretation in its enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). This is most apparent from the amendment to §5(2)(f) in the 4-R Act (since recodified as Section 11347) which established the past practices of the Commission concerning employee protection as one of two governing standards. Thus, §5(2)(f), as amended, required the Commission to provide employee protection "no less protective of the interest of employees than those heretofore imposed pursuant to this subdivision" and those established pursuant to Section 565 of Title 45. The governing inquiries with respect to the scope of the present labor protective provisions thus involve the Commission's customary practices in cases prior to the 4-R Act and the provisions of Appendix C-1 (which were established under Section 565 of Title 45).

With respect to the first inquiry, there simply is no basis for dispute. As noted above, the Commission has *uniformly* rejected the argument that it is required to protect employees of competing

[23]See, *e.g.*, section 4 of the WJPA cited by the Commission, 360 I.C.C. 949 n.81 which provides:

> "*Each carrier contemplating a coordination* shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient *to the interested employees of each such carrier* and by sending registered mail notice to the representative of such interested employees." (emphasis supplied)

[24]*Baltimore & Ohio Railroad Co. Operation*, 261 I.C.C. 615, 619-620 (1946); *Southern Railway Co.—Control—Central of Georgia Railway Co.*, 317 I.C.C. 557, 567-8 (1962) *aff'd, Railway Labor Executives' Association* v. *United States*, 226 F. Supp. 521 (E.D. Va. 1964); *Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co.*, 317 I.C.C. 261 (1962); *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 203-204 (1963), *aff'd, Florida East Coast Ry.* v. *United States*, 259 F. Supp. 933, 1019 (M.D. Fla. 1966), *aff'd per curiam*, 386 U.S. 545 (1967); *Texas & Pacific Ry.—Control—Kansas O. & G. Ry.*, 321 I.C.C. 309, 339 (1964); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 328 I.C.C. 304, 343-344 (1968); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967); *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd. sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir., 1979).

carriers and has consistently limited employee protection to affected employees of the merging carriers. It is equally clear that the provisions of Appendix C-1 are properly reflected in the conditions imposed in this case and do not require protection for employees of competing carriers.[25]

In the *New York Dock* proceedings, the Commission, after careful consideration of Appendix C-1 and prior administration of §5(2)(f), formulated the conditions which it imposed in this case (360 I.C.C. 60, Appendix III). RLEA participated in the *New York Dock* proceedings before the Commission and submitted a proposed set of conditions which provided exactly the same protection for employees of competing railroads of RLEA sought in the present proceedings. (Article V of Appendix I, 360 I.C.C. 60; Exhibit H-58 herein). The Commission rejected the tendered provision. On review, the Court of Appeals for the Second Circuit (with RLEA participating) held that the labor protection conditions formulated by the Commission complied with the mandate of §5(2)(f), as amended (now Section 11347), taking into account both the past practices of the Commission in prescribing employee protection and the provisions of Appendix C-1.

As both the Commission and the Court of Appeals noted, the express Congressional approval of past Commission administration of §5(2)(f) in the 1976 legislation completely forecloses the attempt by RLEA to secure a novel interpretation of that section in this case. (360 I.C.C. at 949, 167a; 632 F.2d at 412, 39a).

[25]It is difficult to believe that RLEA seriously relies on the contention, advanced for the first time in its petition, that the reference in the Rail Passenger Service Act (RPSA) to employees of terminal companies indicates that "Congress has in effect mandated that employees of non-applicant carriers be protected". (Pet., p. 13) The protective conditions established pursuant to this statute (Appendix C-1) provide protection for those employees of terminal companies which are owned in whole or in part by one of the applicants and which have a relationship to the applicants similar to that of the terminal company involved in *Railway Labor Executives' Association* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963). Protection for employees of such associated companies has been imposed by the Commission in the past on the basis that they "were in reality, though not in contract" the employees of the applicants (216 F. Supp. 101 at 103). In fact, the *New York Dock* conditions which the Commission imposed in this case include an identical provision (Article III of Appendix III, 360 ICC 60 (1979)) relating to terminal companies. The provisions established pursuant to 45 USC § 565 thus refute RLEA's claim that the Commission was required to extend protection to employees of the numerous competing carriers involved in these proceedings.

NLRB v. *Bell Aerospace,* 416 U.S. 267, 274-275 (1974). This conclusion is also supported by the fact that Congress again had occasion to review this provision in its amendments and recodification of the Interstate Commerce Act in 1978. Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337. Although the language of that section was changed in certain respects, the provision affirming the Commission's past practice was left intact.[26] As the Court of Appeals properly decided, "this double affirmation by Congress, in the absence of any other support for the RLEA position, puts the question to rest." (632 F.2d at 412, 39a).

RLEA relies on two judicial decisions to support its construction of the statute. *Railway Labor Executives' Assoc.* v. *United States,* 216 F. Supp. 101 (E.D. Va. 1963) and *Soo Line R. Co.* v. *United States,* 280 F. Supp. 907 (D. Minn. 1968). (RLEA Pet., p. 7). Its reliance on the first case is entirely misplaced, for there the court specifically found that the employees to be afforded protection were in effect employees of the merging carriers.[27] This decision, therefore, clearly cannot be read as supporting RLEA's position that to employees of competing carriers must be protected.

Moreover, the following year in a case brought before the same court by RLEA (and involving two of the same three judges), the court unambiguously rejected RLEA's far broader construction of the statute urged on petition to this Court. *Railway Labor Executives' Association* v. *United States,* 226 F.Supp. 521, 525 (E.D. Va. 1964). In a subsequent decision, the Commission likewise explicitly rejected RLEA's interpretation of that earlier decision, again affirming its settled position that §5(2)(f), now

[26]RLEA argues that this 1978 Congressional recodification of the provision is not significant because the "recodification may not be construed as making a substantive change in the laws replaced." (Pet., p. 14-15) BN, however, is not contending that the 1978 recodification to §5(2)(f) effected any substantive change, but instead is making precisely the opposite point—that Congress again impliedly approved, as it did in 1976, the Commission's past administration of the statute respecting employee protection. *See, e.g., Bell Aerospace, supra.*

[27]There protection was granted to employees on the payroll of the Chesapeake & Ohio, who actually performed work for the merger applicant, Seaboard, at a jointly-owned terminal facility. The court found that because of their immediate relationship to Seaboard "they were in reality, though not in contract, as much the employees of Seaboard as of Chesapeake," and hence entitled to statutory protection. 216 F. Supp. at 103.

§11347, was not intended to apply to employees of competing roads. *Pennsylvania R. Co.—Merger—New York Central R. Co.* 328 I.C.C. 304, 313-14 (1966).

RLEA's reliance on the one aberrant decision in *Soo Line* is also misplaced. In *Soo Line,* the court held that employees of competing carriers, if adversely affected by a merger transaction, are within the scope of §5(2)(f) protection. The Commission had rejected such a construction below based on its long-standing statutory interpretation and compelling policy reasons. *Chicago & N.W. Ry. Co.—Merger,* 330 I.C.C. 13, 54 (1967).

As the Court of Appeals noted, *Soo Line* predates and is inconsistent with the governing standard approved by Congress in amending §5(2)(f) in the 4-R Act. (39a). This standard clearly excludes from the minimum requirements of the statute (§5(2)(f)) protection for employees of competing carriers because the Commission has not imposed such protection in its prior administration of the Act. Moreover, on remand of the *Soo Line* decision, the Commission again disagreed with the holding of the court, and, in fact, did not impose protective conditions for employees of the Soo Line Railroad. 333 I.C.C. at 252-3. The Commission's response to the *Soo Line* decision thus preserves intact its history of refusal to accord protection to employees of competing carriers, and this approach was approved by Congress when §5(2)(f) was amended by the 4-R Act.

The decision of the Court of Appeals below properly recognized that the *Soo Line* decision should not be accorded any weight as a legal precedent because it "was decided before Congress amended and recodified §5(2)(f) in 1976 and 1978." (632 F.2d at 412, n.50, 39a). In view of the absence of any conflict in decisions, the unambiguous legislative history of the statute and its settled construction, there is absolutely no reason for this Court to review this issue.

B. The Court of Appeals Properly Found that the Commission Fully Discharged Its Statutory Mandate under Section 11344 to Consider the Interest of Carrier Employees Affected by the Transaction.

RLEA contended before the Court of Appeals that §11344(b)(4) requires that Commission to consider the "interest of the carrier

employees affected by the proposed transaction" as an element of the public interest before it decides whether a merger is "consistent with the public interest." (Br., p. 14) RLEA contended that the Commission's consideration of the impact of the merger on railroad employees did not occur in proper sequential order because the Commission's discussion of this subject at pp. 946-950 of its decision follows the statement that "we have decided to approve the merger." *Id.* at 946. In categorically rejecting this argument, the Court of Appeals correctly found that "Section 11344 is not intended to dictate a procedural order for the Commission's considerations," and, hence, that the Commission's "thorough discussion of the effect of the merger on employees fulfilled all the statutory requirements." (632 F.2d at 412-413, 40a).

RLEA now contends that "when it [the Commission] considered the impact of the proposed transaction upon non-applicant carriers' employees, the ICC examined it solely with the question of whether Section 11347 of the Act required the imposition of protections." (RLEA Pet., p. 16) According to RLEA, this approach "effectively deprived other carrier employees of a fair hearing on this issue." (Pet., p. 17)

Since both 49 U.S.C. §11344(b)(4) and §11347 refer to the interests of "employees affected" by a proposed transaction, it would seem indisputable that the Commission's conclusion that employees of competing carriers are not entitled to protection under §11347 also fixes the scope of the identical phrase in §11344(b)(4). This issue, however, is not raised by this case because the Commission did consider the interests of all carrier employees and it discussed and evaluated the impact on such employees in the process of determining that the proposed merger was consistent with the public interest.

Thus, as the Court of Appeals noted (632 F.2d at 412-413, 40a), the Commission on its own initiative conducted a comprehensive analysis of the impact of this merger on all railroad employees by sending out detailed questionnaires to the fourteen carriers who might be conceivably affected by the merger. In response to the questions posed by the Commission, ten of these re-

sponded that the merger will have *no* adverse impact on their employees.[28] Four stated that there might be some adverse impact: Rock Island, Milwaukee, Katy and Illinois Central Gulf: 360 I.C.C. at 860; 848-9; 872; and 881 (78a; 66a-67a; 90a; 99a). The Rock Island, of course, is currently being liquidated, and is no longer an operating carrier. The suggestion that its employees might be adversely affected by the merger is thus sheer fantasy. The same is true of the Milwaukee which is in the process of liquidation and restructuring. Moreover, Congress has specifically provided in separate recent legislation for comprehensive protective benefits for employees of both carriers. (Public Law 96-265, 94 Stat. 399; 45 U.S.C. §907-14). It cannot be argued, therefore, that consummation of this merger will adversely affect these employees.

The remaining two carriers (Katy and ICG) stated that it would be difficult, if not impossible, to identify employees affected by the merger. Katy claimed a possible impact on only 37 employees but admitted that even this would be "mitigated by attrition." (360 I.C.C. at 872, 90a). ICG stated that the adverse impact could not be "precisely defined" because any decision to cut back is the result of "numerous variables besides the proposed merger." (360 I.C.C. at 881, 99a). After reviewing this evidence, the Court of Appeals properly found "that this investigation and the Commission's thorough discussion of the effect of the merger on employees fulfilled all the statutory requirements." (632 F.2d at 412-413, 40a). RLEA's assertion that the Commission did not examine the interests of carrier employees in its decision to approve the merger is, therefore, totally refuted by the facts.

Because the evidence of record demonstrates that employees of competing carriers will not be adversely affected by this merger, RLEA's recently-contrived recitation of issues the Commission should have considered in its discussion of this issue is plainly irrelevant. Thus, RLEA complains that the Commission did not determine "if it would be consistent with the public interest to

[28]Denver & Rio Grande Western; Soo Line; Union Pacific Railroad; Chicago and North Western; Kansas City Southern; Atchison, Topeka and Santa Fe; Family Lines; Southern Pacific; Southern and Missouri Pacific. 360 I.C.C. at 908, 897, 915; 912; 909; 911; 913; 911; and 908 (126a; 115a; 133; 130a; 127a; 129a; 131a; 129a; 126a).

authorize a transaction which would cause employees of other rail carriers to bear unaided the burden of the BN-Frisco's profits." (Pet., p. 16) Obviously, such a determination is not required where the evidence demonstrates no such adverse labor impact. The same is true of RLEA's other criticism—that the Commission did not determine whether "it should impose certain provisions to aid those affected rail employees, such as a requirement that furloughed non-applicant employees be given priority of employment with the merged carrier." (*Id.*) Moreover, contrary to RLEA's claim, it was not "denied a fair hearing on this issue," (Pet., p. 17), but instead elected not to present any affirmative evidence of its own regarding the merger's impact on employees of competing carriers. Having taken this position, RLEA cannot now criticize the extensive evidence produced by the Commission itself on this issue.

It is clear, therefore, that the Commission fully addressed "the interest of carrier employees affected by the proposed transaction" in accordance with the requirements of 49 U.S.C. §11344(b)(4).

CONCLUSION

For the foregoing reasons, the various petitions for certiorari should be denied.

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